

No. 76-1287

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT STONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed without opinion (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1977. The petition for a writ of certiorari was filed on March 17, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether certain evidence was lawfully seized.
2. Whether there was independent evidence of petitioner's participation in the conspiracy sufficient to provide an adequate predicate for the admission of hearsay statements of a co-conspirator.

3. Whether the trial court was required to conduct an "in-depth hearing" before allowing petitioner to be represented by an attorney who, as petitioner knew, was under indictment for a narcotics offense.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846 (Count I), and of two substantive offenses of distributing cocaine, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A) (Counts II and III).¹ He was sentenced to three concurrent terms of ten years' imprisonment and three concurrent special parole terms of three years. The court of appeals affirmed without opinion (Pet. App. A).

On April 21, 1976, Magdalena Gogue, a paid informant for the Drug Enforcement Administration, purchased two ounces of cocaine from petitioner's co-defendant, Danny Roman (Tr. 36-37).² At that time, Roman told Gogue that his "number one" source of supply was in Cleveland and that the cocaine from that source would cost \$300 more per ounce because it was of better quality (Tr. 39). On April 29, 1976, Gogue asked Roman to get her two ounces of cocaine from his Cleveland source (Tr. 40). On July 27, 1976, Roman drove Gogue to 1725 York Avenue in Manhattan and entered an apartment building. He told Gogue that he

¹The two substantive counts on which petitioner was convicted involved sales of cocaine on July 30 and August 3, 1976. Petitioner was acquitted on a fourth count of distributing 5.96 grams of cocaine on August 3, 1976. Co-defendant Roman pleaded guilty to a reduced offense. Co-defendant Greene, tried with petitioner, was acquitted.

²We are lodging a copy of the transcript of the trial ("Tr.") and of the suppression hearing ("Supp. H.") with the Court.

was carrying out a deal for somebody else with the Cleveland source (Tr. 71-74).³ Thereafter, Gogue alerted other DEA agents that the Cleveland source lived at 1725 York Avenue (Tr. 75).

On the evening of July 30, 1976, Gogue arranged with Roman to purchase two ounces of cocaine from his Cleveland source. After obtaining \$3,600 from the DEA, Gogue drove with Roman to 1725 York Avenue (Tr. 87). Roman took the \$3,600 and entered the building. After about thirty minutes, he returned and gave Gogue two ounces of cocaine (Tr. 88-95, 299-300, 367-368).

On August 2, 1976, Gogue called Roman and attempted to negotiate the purchase of an additional two ounces from the Cleveland source (GX 22). At approximately the same time that Roman was to pick her up, Gogue was informed by the DEA agents that petitioner had been seen leaving the York Avenue address. Because the agents wanted to identify petitioner positively as the Cleveland source and arrest him after the transaction occurred, Gogue was instructed to delay the deal (Tr. 98). She did so, and arrangements were made to make the purchase the next day, August 3, 1976 (Tr. 99).

That morning, Gogue arranged with Roman to purchase two ounces of cocaine from the Cleveland source. Because petitioner had been seen by DEA agents leaving the York Avenue apartment and proceeding to Harlem, Gogue was again instructed to delay the transaction (Tr. 372), and she then called Roman and did so. At approximately 3:30 p.m., the agents advised Gogue that petitioner had returned to 1725 York Avenue; Gogue called Roman and asked him

³A number of tape-recorded telephone calls between Gogue and Roman relating to arrangements for purchasing cocaine from the Cleveland source were played to the jury.

to pick her up, and they then drove to 1725 York Avenue. Gogue gave Roman \$3,600 in government funds, and he entered the building (Tr. 99-103). The DEA Group Supervisor saw Roman get off the elevator at the eleventh floor and enter Apartment 11B. The supervisor heard Roman apologize for his lateness and heard a woman respond. Inside the apartment Roman apologized again, and a man responded, "That's okay, I just got back" (Tr. 167-170, 270). About thirty minutes later, Roman left the apartment carrying a small leather bag, returned to Gogue, who was waiting in the car, and gave her two ounces of cocaine. At this point, Gogue gave a prearranged signal, and she and Roman were placed under arrest (Tr. 104-105). Several of the bills the government had furnished Gogue for the July 30 and August 3, 1976 cocaine purchases were found in Roman's possession (Supp. H. 24-25).

The arresting agents told Roman they knew that the drugs had been obtained from petitioner's apartment. Roman nodded his head, and the agents sought to obtain his cooperation. Roman refused, expressing fear of personal violence if any action were taken immediately. The DEA supervisor then requested the doorman to call petitioner and tell him that some officers were examining his car in the basement garage because they thought it might be a stolen vehicle and that they wanted petitioner to come down. When petitioner complied, he was arrested. The agents then arrested Phyllis Greene, petitioner's common law wife, and with her consent, searched the apartment where she and petitioner lived (Pet. App. 51) and seized marked currency.

ARGUMENT

1. Petitioner argues (Pet. 25-31) that the warrantless search of the York Avenue apartment violated the Fourth Amendment (a) because the presence of the agent in the

hallway outside the apartment when incriminating information was overheard was illegal and tainted the search and seizure, and (b) because the arrest of Phyllis Greene was not based on probable cause and, but for that arrest, she would not have consented to the search of the apartment. Neither contention has merit.

a. Before entering the apartment building the agents told the doorman that they were law enforcement officers. The doorman then permitted the agents to enter the building (Supp. H. 186-187). In these circumstances, the agent did not violate any rights of petitioner by positioning himself in the hallway outside the apartment occupied by Greene and petitioner. See, e.g., *United States v. Wilkes*, 451 F. 2d 938, 941 n. 6 (C.A. 2); *United States v. Conti*, 361 F. 2d 153, 156-157 (C.A. 2), vacated on other grounds, 390 U.S. 204.⁴

b. Petitioner contends (Pet. 25-28) that the arrest of co-defendant Greene was illegal because it was made without probable cause and that the evidence discovered as a result of a search of the apartment undertaken with her consent should therefore have been suppressed as the fruit of the poisonous tree. After reviewing the evidence, the district court found (Pet. App. 53) that there was probable cause to

⁴Petitioner's assertion that the Sixth Circuit's decision in *United States v. Carriger*, 541 F. 2d 545, is in conflict with this case is incorrect. The holding in *Carriger* applies to the situation in which "an officer enters a locked building, without authority or invitation * * *" (*id.* at 552). Here, the agent entered a high-rise apartment building after they identified themselves to the doorman as law enforcement personnel and obtained his permission to enter. See *Frazier v. Cupp*, 394 U.S. 731, 740; *United States v. Matlock*, 415 U.S. 164.

McDonald v. United States, 335 U.S. 451, and *Fixel v. Wainwright*, 492 F. 2d 480 (C.A. 5), upon which petitioner also relies, are inapposite. *McDonald* involved forcible entry into a rooming house, and *Fixel* involved trespass into a yard that was not a common passageway; in neither case had consent to the entry been procured.

arrest Greene, who had admitted Roman to the apartment and been present during the drug sale. *Ibid.* This essentially factual conclusion does not warrant review by this Court.

Moreover, whether or not the arrest of Greene was lawful, it did not violate petitioner's rights, and his claim therefore founders for lack of standing. True, the warrantless search of the apartment shared by petitioner and Greene may be attacked by petitioner on the ground that Greene's consent thereto was involuntary; however, petitioner has not really made that objection, but only an objection, like that of the petitioner in *Brown v. Illinois*, 422 U.S. 590, that the voluntary consent was tainted by a prior illegal arrest.

In any event, it is settled that an arrested individual can give a valid consent. *United States v. Watson*, 423 U.S. 411. The question remains a factual one of voluntariness, and the fact of arrest—legal or illegal—is merely one factor to be evaluated in determining voluntariness. In this case, the fact of arrest was considered by the district court in its review of the totality of the circumstances surrounding Greene's consent to the search of the apartment and the ensuing plain-view discovery of the currency (Pet. App. 53-57), and its conclusion that the consent was voluntary and valid on the facts of this case would not warrant review by this Court even if the issue were properly raised by the petition and petitioner had standing to challenge the legality of Greene's arrest.

2. Petitioner contends (Pet. 31-41) that even if he was shown to have been a member of a conspiracy with Roman in July and August 1976, there was no reliable independent non-hearsay evidence that he was a member of the same conspiracy in April and May of that year, and therefore the admission of statements Roman made to Gogue in April and May regarding Roman's "Cleveland source" violated petitioner's right of confrontation. This claim was rejected

by the trial court (Tr. 516-520), and it does not warrant review here.

At the outset, we note that petitioner was sentenced to equal concurrent terms of imprisonment on the conspiracy conviction and on the two substantive convictions; since this contention appears wholly unrelated to the substantive counts it is therefore not necessary to consider the claim. *Barnes v. United States*, 412 U.S. 837, 848 n. 16. Nor is the claim of error even material to the conspiracy conviction, since there was ample nonhearsay evidence to establish that Stone and Roman were engaged in a conspiracy to distribute cocaine. On July 30 and August 3, Roman purchased cocaine with marked currency later found in petitioner's apartment (Supp. H. 24-25), and Roman obviously had had prior contact with petitioner, as the trial court found (Tr. 518). Given the substantial evidence that petitioner was the person referred to by Roman as the "Cleveland source" during the entire period⁵ and that Roman and petitioner were engaged in a cocaine distribution conspiracy in July and August (pp. 3-4, *supra*), Roman's earlier statements were plainly reliable and properly admitted as co-conspirator declarations. Moreover, any error in their admission was harmless in view of the overwhelming independent evidence of the conspiracy.

3. Finally, petitioner argues (Pet. 42-46) that his conviction must be reviewed because the district court allegedly failed to make a satisfactory pre-trial inquiry concerning a possible conflict of interest arising from defense counsel's indictment for narcotics offenses. *United States v. Carrigan*, 543 F.2d 1053 (C.A. 2), and similar cases cited by petitioner (Pet. 43-46) have no bearing on this issue. Each

⁵E.g., Government's Br. on Appeal, pp. 3-12

deals with the trial court's obligation to scrutinize the situation in which a defense attorney represents several defendants with potentially conflicting interests. Here, petitioner's attorney represented petitioner alone.

The trial judge asked defense counsel, in petitioner's presence, to explain to petitioner that he was under indictment. Defense counsel stated that he had previously advised his client of that fact and had explained to him its possible implications (Supp. H. 2-4). The trial judge then asked petitioner whether he was aware of the indictment of his counsel and whether he wished his counsel to continue to represent him. Petitioner responded in the affirmative to both questions (Supp. H. 3).⁶ No more was required.

The conflict of interest suggested by petitioner is that his trial counsel, in a effort to curry favor with the prosecutors, might have been motivated to forego a vigorous defense of petitioner. While petitioner has combed the record in retrospect and now suggests several tactical errors that may have been made by his trial counsel (Pet. 45-46), it is sheer speculation to suggest that these minor errors—if errors they were—represented a deliberate attempt to subvert petitioner's case for the personal benefit of counsel. While we do not suggest that a defendant in a criminal case may be forced to accept representation by a lawyer who is under indictment, petitioner knew the pertinent facts and expressed in open court his desire to continue being represented by his counsel. In the absence of any plausible showing that counsel did not faithfully discharge

⁶Petitioner's reference to his attorney's remark, "I don't know for sure whether or not I object" (Supp. H. 4) is misleading. This statement, read in context in the transcript, is not an objection but was intended by petitioner's counsel as a humorous observation regarding his own indictment.

his responsibilities, and given the improbability that counsel would fail to render effective service for the reason suggested by petitioner, the district court's inquiry was sufficient. Petitioner—understandably disappointed with the outcome of the trial—should not now be permitted to change his mind about his trial representation.⁷

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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⁷At the time of petitioner's trial, there were no negotiations underway between his attorney and the prosecutors regarding the charges against the attorney. Those negotiations were not commenced until a month after petitioner's conviction. They resulted in an agreement under which petitioner's counsel was permitted to plead guilty to a misdemeanor on condition that he resign from the bar (Government's Br. on Appeal, pp. 26, 30).